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In the Supreme Court of the United States,

OCTOBER TERM, A. D. 1901.

No. 282.

S. N. BURT and H. R. BURT, *Petitioners*,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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It will not be presumed that death at the hands of justice is a risk contemplated in contracts of life insurance.

And an express provision of that nature would be contrary to public policy, and void.

These propositions are not affected by any consideration of the actual guilt or innocence of the condemned.

STATEMENT.

The case is fully and fairly stated in the brief for the petitioners.

It seems to be conceded that death under sentence of law, upon just conviction of a capital offence is not an insurable risk. Indeed, this has been settled doctrine since the case of Amicable Society vs. Bolland (4 Bligh, N. R. 194), known as Fauntleroy's case, favorably commented upon by this court as recently as in the case of Ritter vs. Insurance Company (169 U. S. 139, 158). But it is

claimed that death upon an unjust conviction is an insurable risk and, in the absence of express stipulation, presumably within the contemplation of contracts of life insurance.

The petitioners are therefore seeking a recovery upon a supposed insurance against the miscarriage of justice.

The respondent says:

First, the contract does not provide for that contingency.

Second, the laws of Ohio, the place of the contract and of the respondent's domicile, do not contemplate it.

Third, an agreement of that nature would be contrary to public policy, and void.

ARGUMENT.

I.

"A policy of insurance is a contract between A. and B., that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event." 2 Bl. 458.

Where the particular event is of such a nature as to admit of this equation between the premium paid by the one party and the hazard incurred by the other, the law admits the policy into the category of valid contracts; where this equation is not ascertainable, the transaction is speculative and invalid. Parties are presumed to intend lawful contracts. Life insurance is in this category because longevity can be calculated. By the aid of mortality tables the money equivalent of the annual hazard of insurance upon a given life is determined with sufficient certainty to satisfy every requirement of the law. As these tables are at the foundation of life insurance it may not be inappropriate to consider them for a moment.

In 1843 there was published in London, "The Combined Experience, or Actuaries' Table of Mortality." It was prepared by a committee of actuaries from the data furnished by seventeen assurance offices, representing assurances upon 62,537 lives. "The American Experience Table of Mortality," published at a later

date in this country, records the experience of The Mutual Life Insurance Company of New York with 68,000 assurances (Encyc. Brit. "Insurance," pp. 170, 183). These works have always been accepted as standards both in England and America; and one or the other of them has been given official recognition in the statutes of many of the states of the union. The American tables are made the legal standard in Ohio (Sec. 279 Rev. St.).

It is important to note that these are not statistics of the race at large. They do not deal with all sorts and conditions of men, or take into account all human vicissitudes. They are merely a record of the accumulated experience of life insurance, where each of the many thousands of subjects was selected precisely as he is to-day, by an inquiry into his condition and environment as affecting his expectation of life under the operation of natural laws. The medical examination and the data required in applications for life insurance to-day, are for the purpose of ascertaining whether the proposed subject conforms to the description of that purely theoretical person, the composite of thousands who have gone before. If he does, he is credited with the same expectation of life as that other, and the regular premium charged him is thus equivalent to the hazard incurred by his insurer.

It follows that the very nature of the business, and its history, which are matters of common knowledge, as well as the negotiations attending each particular contract, give notice to the parties that the event insured against is death under the operation of natural, not of human laws; laws whose operations may be forecasted.

To illustrate: The rate of premium increases with the age of the insured. The hazard of unmerited capital punishment fortunately does not increase as one grows older. Indeed, at the limit of the insurable age, when life insurance can not be purchased at any price, this particular hazard may be fairly said to have terminated altogether. This consideration alone is sufficient to force upon the mind the conclusion above expressed.

This was the mode of reasoning employed by Mr. Justice Harlan in the case of Ritter (169 U. S. 139) above referred to. He said:

"The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables, showing at any age the probable duration of life" (p. 152).

Again: " . . . a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should . . . be interpreted as intended to cover . . . only death occurring in the ordinary course of his life" (p. 152).

And further, after referring to certain familiar clauses in the contract:

"These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured" etc. (p. 153).

Adopting the language of the chief justice of the supreme court of Alabama in the case of Supreme Commandery vs. Ainsworth (71 Ala. 436, 446), he said:

"In all contracts of insurance, there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to," etc. (p. 157).

I do not overlook the fact that life insurance includes the hazard of death from external causes; but that is only to the extent that such external causes are accidental in the legal sense. It is hardly necessary to argue that the lawful execution of the judgment of a court of competent jurisdiction is not an accident, however large a part accident may have played in the course of events leading to the judgment.

Since it is conceded that the parties presumably do not contract with reference to capital punishment justly administered, certainly it follows that some unequivocal expression should appear in the contract in order to persuade the reasonable mind that nevertheless the risk of judicial murder was contemplated. For it is hardly conceivable that the parties would intentionally make any such distinction. It is not uncommon to find policies expressly excluding the event of death at the hands of the law; but I have found no single instance where, with that subject thus prominently before the minds of the contracting parties, any inquiry into the actual guilt or innocence of the condemned was provided for. It seems to be well settled that the words "death at the hands of the law" or their equivalent, relate only to the nature of the death itself and not to any of the causes or conditions which may have preceded it.

3 Joyce on Insurance, Sec. 2611.

As early as in the leading case of Clift vs. Schawbe (3 Mann. Gr. & S. 436), where the policy under consideration excluded death "by duelling or by the hands of justice," Patteson, J., observed:

"I apprehend that the actual felony is no part of the cause of exception from liability. If it were, it would be competent to the plaintiff to prove that the deceased, although dying by the hands of justice, was in truth innocent of the crime for which he suffered; in the same manner as it is, no doubt, competent to an executor to traverse an inquest of felo de se, found upon view of the body of his testator by a coroner's jury; or that the deceased, although killed in a duel, had fired his pistol in the air and never contemplated shooting at his opponent. Such defences would surely be excluded, for the words of the exception are express— 'die by the hands of justice,' whether justly or not, or 'by duelling,' whether it were felony or not" (p. 466).

II.

The respondent is a corporation organized under the laws of Ohio and the contract was made in Ohio. A brief reference to the statutes of that state will show that death under the operation of

natural laws was the only insurable risk contemplated by the legislature.

Section 3587 Rev. St. authorizes the formation of companies "to make insurance upon the lives of individuals;" and section 3596 prohibits them from undertaking "any business or risk, except as herein provided."

By section 3623 the application is made a part of the contract and required to be copied into the body of the policy delivered to the insured, thus showing a legislative intent to base the contract upon a calculation of the natural duration of life; indeed, that phraseology is used in Sections 3628 and 3629, i. e.: "for the term of his natural life."

Section 3603 requires the filing of an annual statement which shall exhibit, among other things, the age of each policy holder at the inception of his contract. Section 3630, e. requires the same thing of foreign life insurance companies, with this addition: that sixty-five years is made for them the limit of insurable age. Are gentlemen who have remained secure against fatal mistrial until that ripe age, thereafter peculiarly susceptible to it? or did the legislature consider that it was dealing with the subject of natural longevity in this chapter?

This purpose is forcibly suggested by certain sections touching discrimination. Section 3631-1 prohibits the insurer from discriminating in any manner between colored and white persons "of the same age, sex, general condition of health and hope of longevity." The next section requires the company to furnish each rejected colored applicant with a certificate, stating that the rejection was not on account of color, but solely upon "grounds of the general health and hope of longevity," as determined by the tests applied to white persons. The next section repeats the language of the two preceding and imposes penalties for their violation. If the Ohio legislature contemplated insurance against unjust conviction of capital offences, it might well have paused before enacting this law; a law which sprang from the legislative recognition of

a race prejudice—the kind of thing which conduces, if anything does, to unfair trial.

Section 3631-4 and those immediately following, deal with the subject of discrimination generally, prohibiting, under the severest penalties, "any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life."

Lastly, as heretofore noted, the American tables, which afford no basis for calculating the results of criminal trials, are made the legal standard in Ohio. "The rate of mortality shall be established by the tables known as the American experience tables," etc. (Sec. 279 Rev. St.).

III.

"Can there be a legal life insurance against the miscarriage of justice? Can contracts be based upon the probability of judicial murder?" Shelby, J., printed record, p. 24.

This statement of the question by the learned judge delivering the majority opinion below, is so rich in suggestion as to at once marshal before the mind every consideration of public policy bearing upon it. The question must be answered in the negative for the following reasons:

Insurance against the miscarriage of justice would be a mere gambling transaction. The hazard could not be measured in experience tables. The premium could not be calculated to the approximation of a quid pro quo. Are there any data extant, or procurable which enable us to say that one per cent. or that one hundredth of one per cent. of the persons who have suffered capital punishment, were innocent? or at what age the hazard is greatest? Such a contract would not differ in principle from gambling upon the rise and fall of markets, which is held invalid.

Williar vs. Irwin, 110 U. S. 499.

Bryant vs. Telegraph Co., 17 Fed. 825.

It would be tainted with the added vice of wagering upon the results of trial, having a tendency to influence the administration of justice. It was held in England as early as in the case of Evans vs. Jones (5 Mees. & W. 77), when wagers were not per se unlawful, that "a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, was illegal, as being against public policy."

Lord Abinger observed:

"No man has a right to acquire, by his own act, an interest in interfering with the proceedings of courts of justice, more especially of criminal justice, in which a man is bound honestly to declare all he knows relative to the case in course of adjudication. Here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner; and, although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to pervert the course of justice, is a sufficient foundation for the illegality of such wagers" (p. 81).

Baron Parke concurred in these words:

"I entirely agree. No case has been cited at variance with the principle laid down by the Lord Chief Baron. It appears to me that it is a reasonable objection to the legality of a wager that it has a tendency to influence and pervert the course of criminal justice. There ought to be a disposition in every person to come forward and give any evidence which he may be in possession of, tending to insure either the acquittal or conviction of a person lying under a criminal charge; but the necessary tendency of a wager of this description is to induce the party to it either to give false testimony, if it be his interest to procure a conviction, or, if the other way to withdraw from the court evidence which he may either possess at the time of laying the wager, or which may afterwards come to his knowledge. And even if a party be not in a situation to suppress or fabricate evidence, still he may influence the result of the trial by prejudicing the public mind on the case, and thus deprive the party charged, of the fair trial to which he is entitled" (p. 82).

Baron Maule added:

"It is too late now to say that no wager can be enforced by law: but I think it would have been better if they had been originally left to the decision of the Jockey Club. This wager is clearly objectionable, as the tendency of it is to prejudice the course of public justice; and, whenever a wager has such a tendency, it is against public policy and is therefore void" (p. 82).

The remedy for the enforcement of such a contract, would involve collateral attack upon judgments. The record of the conviction would be a necessary item of evidence upon the issue of capital punishment. To permit the parties thereafter and in the same cause to offer evidence of the innocence of the condemned, would be to put directly in issue the propriety of the judgment in the criminal proceeding.

I do not contend for the estoppel of res judicata in favor of that judgment; for the weight of authority is clearly against it. A civil action will lie for the tort of murder and the result will not be prejudiced by a prior judgment either of acquittal or conviction in the prosecution for the crime. But that does not involve any collateral attack. The two proceedings follow parallel lines and do not touch at any point. The issue is the same in both cases and each pursues that issue independently and without cognizance of the other's existence.

But in the supposed case the issues would not be the same as in the criminal prosecution. The two proceedings would not follow parallel lines; they would clash at right angles. A recovery on the policy would not depend on the guilt or innocence of the insured. He might commit murder and yet, through flight or acquittal, live out his expectation of life and at the end mature his policy. (Q. Could the insurer cancel his policy after an acquittal, on the ground that he ought to have been hanged?) The recovery would depend on whether or not he was rightly or wrongly hanged; that would be the issue in the case. Such collateral attack is forbidden upon weightiest considerations of public policy.

"It is the policy of every state or organized society to uphold the dignity and integrity of its courts of justice. Such contracts . . . would tend to encourage a want of confidence in the effeciency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kinds were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon by the executive. Such contracts would encourage litigation and bring reproach upon the state, its judiciary and executive." Shelby, J.

Even in actions for malicious prosecution, where, after the record of acquittal is introduced, the defendant is permitted to offer evidence which may tend to show that the plaintiff, though acquitted, was nevertheless guilty, the testimony is not admissible upon an issue of guilty or not guilty, much less upon an issue of right or wrong acquittal; but merely upon the issue of probable cause, justifying the prosecution.

Such insurance would have a tendency to persuade an innocent accused to barter away his defense, or even to plead guilty, leaving the proofs of his innocence in the hands of his family for their recovery of the funds. This might be prompted by a morbid sense of duty to an ill-provided family, or by mere suicidal impulse. In the latter aspect it would come strictly within the principle and reasoning of Ritter vs. Insurance Company already cited. In any case the right and duty to defend against unjust accusation can not be bartered away, any more than one may lawfully consent to his own murder—or vivisection, to cite a recent instance.

"There are certain fundamental rights which no man can barter away, such for instance, as his right to life and personal freedom, and, in criminal cases, the right to be tried by a jury of his peers. Courts have even gone so far as to say that a man can not consent to be tried by a jury of less than twelve men, whatever may be the circumstances under which the twelfth man may be taken from the panel." Mr. Justice Brown, in Pope M'f'g. Co. vs. Gormully, 144 U. S. 224, 234.

To some extent, also, such insurance would have a tendency to encourage crime. In Fauntleroy's case, Lord Lyndhurst declared that insurance against merited capital punishment would have such a tendency, thus:

"Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crime? namely, the interest we have in the welfare and prosperity of our connections?"

The learned judge below gave to the less extreme supposed case under consideration its just significance, when he said:

"This condition would not be as encouraging to the insured determined on crime as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution—that the beneficiaries would have a right of action on the policy with chances of success, even if he was apprehended, convicted and executed." Shelby, J.

COMMENT.

The learned circuit judge who dissented from the majority opinion below, and the counsel for the petitioners, misconceive the questions at issue. They argue, first, that liability hinges upon the guilt or innocence of the insured; and second, that the record of conviction is not conclusive upon that issue.

It has not been claimed at any time that the record was conclusive upon the issue of guilt or innocence; but merely that that was not the issue involved: that life insurance deals with the conduct of the insured only in so far as it may have a bearing on the question of proximate cause of death. If an insured is killed while engaged in murder, and because of it, his guilty act is the proximate cause of death, and is the issue in an action on the policy. So if, as in Ritter's case, he die by his own deliberate act. But where his death is at the hands of justice the judicial judgment is the proximate cause and the sole issue in the case. The circumstances of

suspicion leading to the arrest, the indictment, the plea, the trial, are so many independent intervening links in the chain of causation. The actual fact back of all these events is remote.

The argument upon the constitutionality of the statute of Texas imposing a penalty of interest and attorneys' fees in insurance cases, is premature. It was not considered in either court below, and can not become pertinent until the respondent's liability has been determined.

CONCLUSION.

To this supposed insurance against judicial murder, the language of Mr. Justice Harlan touching insurance against suicide is most appropriate:

"A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment" (p. 154).

No countervailing argument can be made upon the suggestion that any considerable number of persons would suffer hardship under the rule of public policy asserted by the respondent. In the whole history of life insurance, we have only one recorded litigation upon a policy on a life terminated by the hand of justice; and even in that case, it was apparently conceded by the parties and assumed by the court, that the propriety of the execution could not be inquired into.

Public policy, as a rule of law, is molded in public sentiment. Here is the record of more than sixty years of popular acquiescence in the doctrine there laid down and for which respondent now contends. If its tendency were more injurious to the public good than the evil which it seeks to avert, that fact would have manifested itself in the courts long before the commencement of this action.

"It is impossible to define with accuracy what is meant by 'that public policy for an interference and violation of which, a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public *as understood at the time* fall within the ban." Mr. Justice Brown, in Pope M'f'g. Co. vs. Gormully, 144 U. S. at p. 233.

It is respectfully submitted that the judgment of the United States Circuit Court of Appeals, affirming the judgment of the Circuit Court, should be affirmed.

ROBERT RAMSEY,
For the Respondent.